No. 47207-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS M. CORREA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 14-1-01077-3

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Decisions Of The Court Of Appeals

U.S. Supreme Court Decisions

Statutes and Rules

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a charging document which includes all of the essential elements of the offense, but not the particulars of the defendant's actions constituting the offense, is constitutionally sufficient where the defendant neither claims nor demonstrates prejudice.

2. Whether the trial court's ruling prohibiting Correa from asking the victim, on cross-examination, whether he had ever borrowed money from Correa and failed to repay it at the time agreed, deprived Correa of his right to present a defense.

3. Whether the trial court imposed any discretionary costs on the defendant without inquiring into his ability to pay.

B. STATEMENT OF THE CASE.

1. Substantive facts.

In July of 2014, James Cushman lived in a house on Mullen Road in Thurston County with a roommate, Rob Simms. RP16, 43-44.[1] Although an adult, Cushman copes with significant challenges. He needs help with "almost everything," including taking medication and purchasing a motorcycle. RP 24, 45-46. Defense witness Nikia Brown testified that Cushman came across as "a little slow." RP 104. His income is from Social Security and his mother, Deanne Lawrence, is his protective payee. RP 43. At

1 All references to the Verbatim Report of Proceedings are to the single-volume transcript of the trial, not including voir dire and opening statements, and sentencing.

the time of trial, Cushman lived with his mother and step-father. RP 43.

In the late spring and summer of 2014, Cushman had "hung out" at the residence of Nikia Brown. RP 16-17, 101. Correa was a good friend of Brown's, and he also spent time at Brown's residence. At the time of trial they had been roommates for approximately a year. RP 105. Cushman and Correa had been there at the same time on a few occasions. RP 16, 101, 117.

On June 14, 2014, with his mother's assistance, Cushman purchased a 2007 Kawasaki ZX 600 Ninja motorcycle for $5801.45, including a helmet. RP 20, 44-45, 47, 58. He took it to Brown's residence and let Correa, as well as other people, ride it for a total of 30 minutes to an hour. RP 21, 102. On July 11, 2014, Cushman had been asleep in the early evening when Correa came to his residence. Cushman had never told Correa where he lived and Correa had never been there before. RP 19. Simms answered the door and wakened Cushman. RP 19. Correa told Cushman he had to go to the grocery store "or something" and needed to borrow the motorcycle. RP 20. Although he was very reluctant to loan his bike, Cushman was afraid that their mutual friends who hung out at Brown's home wouldn't like him anymore if he refused. RP 19, 22.

Cushman agreed that Correa could borrow the motorcycle if he put gas in it and returned it that evening. He asked if Correa had a motorcycle endorsement; he said he did. Correa told him he'd be back in 45 minutes. RP 20. Correa testified that he asked to borrow the bike for a couple of hours. RP 121. Correa also borrowed Cushman's motorcycle helmet. RP 50-51, 78. Correa gave Cushman his cell phone number. RP 22. When Correa had not returned the bike after an hour, Cushman called the cell phone number. It rang a few times and then an automated voice told him the voicemail box was full. RP 22. He called the number five to seven times that night; eventually it stopped ringing and simply announced the voicemail box was full. Cushman gave up after approximately three more tries. RP 25.

Shortly after Correa left with the bike, Simms called Cushman's mother and told her someone had taken it. His parents went to Cushman's house about 9:30 p.m., and at first Cushman lied and said the bike was in the garage. They checked, and, when confronted, he admitted that he had loaned it to someone. RP 24, 48. There was no sign of Correa or the bike the following day, July 12, or the day after that, July 13. Lawrence testified that on July 12, she and her husband had to take Cushman somewhere

because he had no other transportation. Before leaving the house, they put a note on the door telling Correa to leave the motorcycle in the driveway and put the helmet and key on the enclosed porch. RP 50-51. At some point Cushman went to Brown's residence but the people there said they had not seen Correa and did not know where the motorcycle was. RP 25.

By July 12, Cushman realized that Correa was probably not going to return the motorcycle and he was frightened that Correa had hurt himself or the bike. RP 26. On July 13, he acquiesced to his parents' urging to go to the police. RP 23. Lacey Police Officer Beverly Reinhold took the report. RP 73. After signing a stolen vehicle report, Cushman thought of looking in a trailer park near the U-Haul business on Martin Way. Cushman and his parents drove through the park and spotted the motorcycle behind a trailer near the back of the trailer park. They drove to the U-Haul lot and called Reinhold. RP 27, 52. They were instructed to wait there until police arrived, and while they were waiting they observed the bike being driven out of the trailer park by someone who was not Correa. RP 27-28, 52-53. They relayed this information to the police. RP 28, 53.

Lacey Police Sgt. Adam Seig heard the dispatch that a stolen motorcycle was westbound on Martin Way. He spotted it at the intersection of Martin Way and Lilly Road, and when other officers arrived to assist, the police stopped the motorcycle in the 2800 block of Martin Way, in front of a branch of Key Bank. RP 68-69. The driver was Robert Stanfill. Stanfill told them that Correa was at his residence, and the officers went there. RP 77. They located Cushman's helmet on a bench or table just outside the door of the residence. Correa was detained and read the *Miranda*[2] warnings, which he waived. He told Reinhold that Cushman owed him money and Correa was teaching him a lesson by keeping the bike. He acknowledged that Cushman had expected the bike back on July 11, but he had planned to return it on the 13th. RP 79-80.

Robert Stanfill testified that in July of 2014 he lived in a trailer park on Martin Way E. He knew Correa but not Cushman. RP 57. On July 11, Correa had brought the motorcycle to his trailer, saying that a friend had let him borrow it for three days. Correa let Stanfill drive the bike to Bremerton on July 12 so Stanfill could help his daughter move. RP 59-60. On July 13, Stanfill

---

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

wanted to cook a steak dinner for Correa to thank him for the use of the bike. He asked Correa to go to Fred Meyer's to get steaks, but Correa told Stanfill to take the bike and go himself. RP 62. Stanfill testified that Correa seemed "a little sketchy," a little nervous and uneasy. RP 63. Stanfill got as far as Lilly Road and was pulled over by the police. RP 59.

Nikia Brown testified that at some earlier time, Correa had loaned Cushman $40 or $50 and although Cushman promised to pay it back the next day, it was three or four days before he did so. RP 105-106. Cushman denied owing Correa any money. RP 25.

Correa testified at trial and denied having a conversation with Cushman about when the bike would be returned. RP 117. Even though he had asked to borrow the bike for a couple of hours, he said he intended to keep the motorcycle for three days to teach Cushman a lesson about repaying his debts promptly. He said he was planning to return the bike the evening that the police recovered it. RP 117-18, 121. He had never discussed with Cushman the possibility of loaning the bike to another person. RP 123. Correa admitted telling Stanfill that he had been loaned the bike for three days. RP 123. He also admitted that Cushman expected him to bring it "right back." RP 125.

2. Procedural facts.

Correa was charged by information on July 15, 2014, with one count of theft of a motor vehicle. CP 6. A jury trial was held on February 2-3, 2015. *See generally VRP.* The jury returned a verdict of guilty. RP 171. Sentencing occurred on February 11, 2015. Correa was sentenced to six months in jail. RP 185; CP 66.

C. ARGUMENT.

1. The document charging Correa with theft of a motor vehicle contained all the essential elements of the offense in the form of facts which support those elements. He did not seek a bill of particulars to clarify any specific acts.

a. Facts supporting the elements of the offense.

Correa claims that the charging document is constitutionally insufficient because it failed to allege facts supporting every element of the offense. In fact, it did. The language of the information was couched in terms of what the defendant did, not merely a list of the essential elements of the crime of theft of a motor vehicle. That charge reads as follows:

> COUNT I – THEFT OF MOTOR VEHICLE, RCW 9A.56.065(1), RCW 9A.56.020(1)(a)—CLASS B FELONY:
> In that the defendant, DOUGLAS MARK CORREA, in the State of Washington, on or about July 11, 2014, did wrongfully obtain or exert unauthorized control

> over the motor vehicle of another, with intent to deprive said person of such motor vehicle.

CP 6. Correa neither objected to the charging document below nor requested a bill of particulars.

An accused has a right to be informed of the criminal charge against him so that he will be able to prepare and mount a defense at trial. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); *see* U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend. 10). The "essential elements" rule requires that, in order to provide adequate notice to a criminal defendant, a charging document must allege facts supporting every material element of the offense, in addition to adequately identifying the crime charged. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (quoting State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). The primary goal of the rule is simply to "give notice to an accused of the *nature* of the crime" with which he has been charged. Kjorsvik, 117 Wn.2d at 101 (emphasis added).

A charging document that is challenged for the first time on appeal will be construed liberally in favor of its validity and will be found sufficient if the necessary elements of the offense appear in any form, or by fair construction may be found, on the face of the

document. McCarty, 140 Wn.2d at 425. Viewed in this way, the charging document will be held to include all facts which are necessarily implied by the language of the allegations. *See* Kjorsvik, 117 Wn.2d at 109. Provided that the necessary elements appear in some form on the face of the document, a defendant can succeed in challenging the sufficiency of the information only where he was "actually prejudiced by the inartful language" of the charges. McCarty, 140 Wn.2d at 425; Kjorsvik, 117 Wn.2d at 103, 106 (noting that a liberal construction and requirement of actual prejudice would prevent defendants from "sandbagging," or challenging an information only after defects could no longer be remedied).

Contrary to Correa's argument, a charging document is not required to describe in detail exactly *how* the defendant is believed to have committed the acts constituting the crime. Appellant's Opening Brief at 10-13; *see* State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991) (holding that an information need not specify the "when, where, or how" of the charged offense); State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d 440 (1990) (holding that an information need not elect the specific means, out of several possible, that a defendant might have violated the statute); State v. Plano, 67 Wn.

App. 674, 678-79, 838 P.2d 1145 (1992) (holding that an information charging assault need not specify which person the accused allegedly assaulted). Indeed, Correa has not pointed to a single instance in which a charging document was found to be constitutionally deficient solely on the grounds that its *factual* allegations were insufficiently specific. He cites to State v. Greathouse, 113 Wn. App. 889, 56 P.3d 569 (2002), *review denied*, 149 Wn.2d 1014, 69 P.3d 875 (2003), to support his argument because the court there found the charging language sufficient in that it contained a number of specifics about the crime. Id, at 905; Appellant's Opening Brief at 11. But the court in Greathouse found the language sufficient because it contained all of the required elements of the offense. It did not say that *all* of those specifics must be present. Id. at 905. In Correa's case, there were sufficient facts to include all of the elements of the offense. It was not, as Correa appears to argue, merely a list of the elements of the offense.

Similarly, Correa cites to State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005), where the information included the date and that it occurred in Clallam County. Id. at 86; Appellant's Opening

Brief at 12. The charging language in Correa's case also included the date and that it occurred in Washington.

The State disagrees with Correa's argument that the charging document in his case is constitutionally insufficient rather than vague. Appellant's Opening Brief at 11. This distinction was drawn in State v. Bonds, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982), and State v. Holt; 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). The courts have repeatedly pointed out that an information which accurately defines the elements of an offense, but is vague as to other matters deemed significant by the defendant, may be corrected by requesting a bill of particulars. *See, e.g.*, Noltie, 116 Wn.2d at 843-44. A defendant who chooses not to request a bill of particulars, however, has apparently found the information to be sufficiently specific and cannot challenge the document's vagueness on appeal. *See* id. In this way, a defendant who believes that the information has failed to specify the "when, where, or how" of its allegations, and who believes that these particular details are necessary to present a defense, may request greater specificity while the prosecution still has an opportunity to provide it. *See* id.

Correa does not claim that he was prejudiced by the language of the charging document, and the record shows that he was not surprised by any of the evidence presented at trial. In determining whether a defendant suffered actual prejudice as a result of a charging document's lack of specificity, a court is permitted to look outside the document itself. State v. Williams, 162 Wn.2d 177, 186, 170 P.3d 30 (2007). Where an information is accompanied by a statement of probable cause that includes details of how the defendant is alleged to have committed the offense, such that the defendant can be shown to have had notice of the nature of the charges, the defendant cannot demonstrate that the information's lack of specificity caused him actual prejudice. *See* id. In this case, the information charging Correa was accompanied by a certification of probable cause specifying exactly where and when Correa was alleged to have committed the offense, the specific vehicle he was alleged to have exerted control over, and the evidence linking Correa to the commission of the offense. CP 4-5. With these details, Correa must have actually understood the nature of the charges against him and would have had sufficient information to prepare a defense. He has not, therefore, suffered actual prejudice.

Correa cites to City of Seattle v. Termain, 124 Wn. App. 798, 103 P.3d 209 (2004), where the Court of Appeals affirmed a Superior Court reversal of a District Court conviction for violation of a domestic violence no-contact order because the charging document failed to specifically identify the victim, the underlying domestic violence crime, or the order Tremain was accused of violating. Id at 803-94. But those specifics are essential elements of the offense of violating a no-contact order. State v. Clowes, 104 Wn. App. 935, 942, 18 P.3d 596 (2001). The identity of the victim of the theft or place of theft are not essential elements of the crime of theft of a motor vehicle.

The information charging Correa, liberally construed in favor of its validity, was sufficient to provide him notice of the nature of the charges he was facing and to adequately prepare a defense. He did not suffer actual prejudice as a result of the information's lack of specificity and therefore his conviction should be affirmed.

b. Facts protecting against double jeopardy.

Correa argues that the charging document in his case does not contain sufficient facts to prevent him from being prosecuted again for stealing the same motor vehicle. Appellant's Opening Brief at 14-16. He cites to State v. Carey, 4 Wash. 424, 30 P. 729

(1892), to support his claim. The State does not dispute that protection from double jeopardy is one of the bases for the requirement that a charging document must inform a defendant of the nature of the accusation against him with reasonable certainty. Id. at 432-33. However, Carey makes it clear that in that context, other documents may also be considered.

In Carey, the defendant had been convicted of practicing medicine without a license. Id. at 430. That crime could be committed by several different acts. Id. at 431. Carey claimed, among other things, that facts stated in the charging document did not constitute a crime. Id. at 430. As a preliminary matter, however, the court had granted his motion to strike the record of the trial because the trial judge had not properly certified it. Id. at 425. "This leaves the case to be considered here on the sufficiency of the complaint . . . " Id. The appellate court would have been able to consider the evidence in the trial record had it been available.

> [T]he indictment must be so specific in the description of the charge that the defendant will be able to avail himself of his acquittal or conviction for protection against a further prosecution for the same cause. Supposing this defendant had seen fit to plead guilty to the indictment, and had paid the fine imposed, and had afterwards been indicted for practicing medicine

> on the same day, *there could have been nothing in the record to show that it was not for the same offense* . . .

Id. at 433, emphasis added.

Here, Correa has a complete record of the trial and if the State were, for some unfathomable reason, to attempt to prosecute him again for stealing James Cushman's Kawasaki Ninja motorcycle on July 11, 2014, he would have a complete defense. In addition, while there are multiple ways of practicing medicine without a license, there is only one way of stealing a motor vehicle, which is to obtain or exert unauthorized control over it. The specifics of who, what, and where are not necessary to protect him from double jeopardy.

2. The ruling of the trial court prohibiting Correa from cross-examining Cushman about a prior debt did not deprive him of the right to present a defense.

Correa maintains that he was denied his right to present a defense when the trial court sustained the State's objection to a question he asked Cushman on cross-examination about whether or not he had borrowed money from Correa. RP 33, 41. The court ruled that any loan was not relevant. The court did not restrict Correa's defense, but did not allow him to ask that question of Cushman. RP 41. Correa did, in fact, get that evidence into the

record. Brown testified that at some unspecified time Cushman had borrowed $40 or $50 from Correa, promised to pay it back within a day, but did not do so for three or four days. RP 102, 105. Correa testified that he intended to keep Cushman's bike for three days because "That's how long he took to pay me back." RP 117-18. The police officer testified that he told her he was keeping the bike longer than agreed to teach Cushman a lesson because Cushman owed him money. RP 79.

A defendant in a criminal case has a constitutional right to present relevant, admissible evidence in his defense. ER104; State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (citing Taylor v. Illinois, 484 U.S. 400, 404-10, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)). The admission or refusal of evidence lies largely within the sound discretion of the trial court; a reviewing court will not reverse the sound exercise of that discretion. State v. Stubsjoen, 48 Wn. App. 139, 147, 738P.2d 306, review denied, 108 Wn.2d 1033 (1987) (citing State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889)).

The trial court was correct that evidence about a prior loan, even if tardily repaid, was irrelevant to the issue of whether Correa

obtained or exerted unauthorized control over a motor vehicle. RCW 9A.56.065(1); RCW 9A.56.020(1)(a).

> "Wrongfully obtains" or "exerts unauthorized control" means:
> (a) To take the property or services of another;
> (b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto; . . . .

RCW 9A.56.010(19)(a), (b).

This statute does not specify a time period, nor does it require that the defendant intend to permanently deprive the owner of the property or services. There is no "I am teaching him a lesson" exception. Correa told the police that he intended to keep the bike for three days. RP 79. Robert Stanfill testified that Correa told him he had borrowed the bike for three days. RP 60. Correa testified that he intended to keep the bike for three days. RP 117. He also admitted that Cushman expected the bike back the same day it was borrowed. RP 79-80, 125. Although Correa gave Cushman a cell phone number, it was impossible to reach him at

that number. RP 22, 25. Neither Correa nor the bike was at Brown's residence, where Cushman would be most likely to look, and where he did look. RP 25. When Cushman and his parents located the bike, it was behind a trailer at the back of a trailer park. 52. Even if the jury believed that Cushman had not repaid a loan on time, Correa was still guilty of theft of a motor vehicle.

"Deprive" means "'to take away'" or "'to take something away from.'" State v. Cuthbert, 154 Wn. App. 318, 338, 225 P.3d 407 (2010), quoting Webster's dictionary. Depriving the owner of a motor vehicle of its use for a substantial period of time constitutes theft of a motor vehicle. State v. Walker, 75 Wn. App. 101, 106, 879 P.2d 957 (1994), *review denied* 125 Wn.2d 1015, 890 P.2d 20 (1995). In State v. Clark, 96 Wn.2d 686, 638 P.2d 572 (1982), Clark had permission to take a friend's car to see his probation officer and inquire about a job, both in Yakima, but was told to return it at noon on the same day. Id. at 687. The car was located more than a month later in Colorado. Id. Clark was charged with and convicted of taking a motor vehicle without permission. Id. On appeal, the Supreme Court held that the victim had given permission and that the correct charge should have been theft under RCW 9A.56.020(1)(a). Id. at 691.

Exceeding the scope of the permission given is theft. Correa admitted to exceeding the scope of the permission given. His claim that he was teaching Cushman a lesson was merely a way to argue he did not intend to permanently deprive Cushman of the bike. The statute does not require that he intend to permanently deprive the victim of the property.

Correa further argues that, although the evidence of the debt did get before the jury, he was prejudiced because the jury was more likely to believe the victim than him or his witness. But even if that were true, the debt is still irrelevant. Correa continues to equate the word "deprive" with "permanently deprive" and that is not the law.

The court did not err by sustaining the State's objection to the question asked of the victim.

3. The trial court did not impose any discretionary costs, and therefore had no obligation to inquire into Correa's ability to pay them.

Correa argues that the court improperly imposed witness fees of $62.48 without inquiring into his ability to pay. Appellant's Opening Brief at 23. However, there is nothing in the record that indicates that those costs were actually imposed. He refers to a cost bill signed by the judge, CP 73-74, but that is only a document

that certifies that the amounts listed are correct and payable by the State of Washington. No such costs were imposed on the defendant by that order, nor are they included in the judgment and sentence. CP 65. There was no mention of those costs at sentencing. RP 179-88.

Since Correa was never required to pay witness costs, this court should not remand for resentencing.

D. CONCLUSION.

The charging document was constitutionally sufficient and the court did not err by refusing to allow him to cross-examine the victim about a claimed debt. The court did not impose any non-discretionary costs. The State respectfully asks this court to affirm Correa's conviction.

Respectfully submitted this 19th day of November, 2015.

Carol La Verne

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND TO--

DAVID L. DONNAN, ATTORNEY FOR APPELLANT
EMAIL: DAVID@WASHAPP.ORG

AND

RICAHRD W. LECHICH
EMIAL: RICHARD@WASHAPP.ORG

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of November, 2015, at Olympia, Washington.

Caroline Jones

THURSTON COUNTY PROSECUTOR

November 19, 2015 - 9:07 AM

Transmittal Letter

Document Uploaded: 6-472074-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 47207-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Caroline Jones - Email: jonescm@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:

david@washapp.org
richard@washapp.org